the individual's liberty is the state's necessity. And "necessity" may be in the future, as it has been in the past, translated into terms of policy.

MUNICIPAL LIABILITY FOR TORT. — In attempting to state the principles upon which the tort liability of municipal corporations is to-day based it is difficult to discover any formula adequate to explain the cases. The rule generally professed by the decisions denies liability for the performance of a governmental function, and allows recovery where the function is municipal, *i. e.*, non-governmental. This distinction is doubtless based upon an analogy to the non-liability of the state for torts.[1] It was natural enough to hold a city exempt when performing functions which in its small sphere corresponded to those handled by the state. But the municipality being a smaller and more adaptable unit has outstripped the state in entering into the economic life of the people. In taking up enterprises formerly conducted by private business the analogy of governmental immunity has been inapplicable, and here the liability of a private person has been imposed. Non-liability for governmental acts has in the main achieved just results because the considerations of policy underlying the immunity of the state have also been present in many of the so-called governmental functions of the city. One weakness, however, has been the failure to realize that the rule, being based upon an analogy, is properly to be used only where the situation is fundamentally similar. The application of the rule has often been too broad and undiscriminating.[2] The chief defect, however, is that the test is not self-defining, and is therefore no true test at all. The state aims to secure to its people a certain minimum of well-being. The extent of this minimum varies with time, place, and circumstance; it is relative and continually changing. To speak of a governmental function, therefore, means little in itself. The test, moreover, purports to be a permanent one; but being in fact ever changing it is ill adapted to the end of setting precedents. Thus if states extend their activities as far as have the cities into the domain of business — as seems very likely to happen under the present tendency — the conception of governmental, if properly applied, would cover all activities of the city. Otherwise it would become a mere historical commentary.

A more specific examination of the present state of the law is now necessary. Classed as governmental are the police,[3] school,[4] health,[5] charities,[6]

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[1] See GOODNOW, MUNICIPAL HOME RULE, 180.

[2] For examples of excessive applications of this sort of an exemption, as, for instance, to common carriers transporting mail, see John M. Maguire, "State Liability for Tort," 30 HARV. L. REV. 20, 27. So independent contractors constructing county roads have been exempted. 29 HARV. L. REV. 323.

[3] See 4 DILLON, MUNICIPAL CORPORATIONS, 5 ed., § 1656.

[4] Hill *v.* City of Boston, 122 Mass. 344; 4 DILLON, § 1658.

[5] Valentine *v.* City of Englewood, 76 N. J. L. 509, 71 Atl. 344; Mitchell *v.* City of Rockland, 52 Me. 118; 4 DILLON, § 1661.

[6] Maximilian *v.* Mayor, etc. of New York, 62 N. Y. 160. Here, as in many other cases of exemption, the decision states that the particular tortfeasor, though appointed, paid, controlled, etc., by the city, is the agent not of the city but of the public. This seems to be only a method of making the result of non-liability appear more conclusive.

and fire departments.[7] On the other hand, water works, gas and electric plants,[8] and toll wharves [9] are everywhere recognized as municipal. Highways one would expect to be governmental; yet outside of New England most American jurisdictions impose a common law tort liability here.[10] Sewers would seem to be equally governmental, and in addition to be closely related to the health service; yet for a failure to repair there is tort liability.[11] The management of parks would similarly seem to be governmental, especially in the larger cities; on parks the authorities are divided.[12] So also as to street cleaning and removal of ashes and garbage there is a split in the cases.[13] Although the repair of sewers is corporate, the maintenance of a city hall is governmental.[14] But there may be liability during the erection of the hall; [15] and the maintenance of a courthouse is apparently municipal.[16] If part of a city hall be rented, there is the liability of a private owner for the condition of the premises;[17] but if it be occupied in part by non-governmental departments, such as those of water and sewers, there is no liability.[18] It is evident that the application to the facts of the distinction between governmental and municipal has been both difficult and obscure.

What, then, should be the test of liability? Where there is a financial return from a municipal enterprise there is at present tort liability — as in the case of city-owned public utilities. But to set up financial return as the test, and grant exemption in all other cases, would not be satisfactory. True it could be applied with greater exactitude than the governmental function test. And it is said the charges for tort claims are more properly made a part of the cost of operation when that cost is paid by the enjoyers of the particular paid service than when it is added to the general tax budget. The argument fails in many of the cases sought to be supported by it, for when, as frequently, the municipal public service is paid for partly by tax money, the extra burden is likely to be on the taxpayer anyway. And whether a particular claim is prop-

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[7] Judson *v.* Borough of Winsted, 80 Conn. 384, 68 Atl. 999. Terhune *v.* Mayor, etc. of New York, 88 N. Y. 247. In Mayor, etc. of Paterson *v.* Erie R. Co., 78 N. J. L. 592, 75 Atl. 922, this exemption was carried so far that a town suing for negligent collision with its fire engine was held not to be barred by the engine driver's contributory negligence.

[8] Rhobidas *v.* Concord, 70 N. H. 90, 47 Atl. 82; 4 DILLON, § 1670.

[9] City of Petersburg *v.* Applegarth, 28 Gratt. (Va.) 321; Mersey Docks Trustees *v.* Gibbs, L. R. 1 H. L. 93.

[10] 4 DILLON, §§ 1687, 1708 *et seq.*

[11] 4 DILLON, §§ 1741, 1742.

[12] Weber *v.* Harrisburg, 216 Pa. St. 117, 64 Atl. 905; Clark *v.* Inhabitants of Waltham, 128 Mass. 567; 4 DILLON, § 1659. A recent Kansas case has held that the keeping of a zoo in a public park is a governmental function, and that the city is not liable when a visiting child is bitten by one of the zoo animals. Hibbard *v.* City of Wichita, 159 Pac. 399. But *cf.* Gartland *v.* New York Zoölogical Society, 135 App. Div. 163, 120 N. Y. Supp. 24.

[13] Missano *v.* Mayor, etc. of New York, 160 N. Y. 123, 54 N. E. 744; Condict *v.* Mayor, etc. of Jersey City, 46 N. J. L. 157; 4 DILLON, § 1662; 13 HARV. L. REV. 59.

[14] Eastman *v.* Meredith, 36 N. H. 284; Moest *v.* City of Buffalo, 116 App. Div. 657, 101 N. Y. Supp. 996.

[15] City of Chicago *v.* Dermody, 61 Ill. 431; McCaughey *v.* Tripp, 12 R. I. 449.

[16] Galvin *v.* Mayor, etc. of New York, 112 N. Y. 223, 19 N. E. 675.

[17] Worden *v.* City of New Bedford, 131 Mass. 23.

[18] Kelley *v.* City of Boston, 186 Mass. 165, 71 N. E. 299.

erly a part of cost or not cannot depend on who is to pay the cost. For instance, damage from the negligent digging of a ditch is no more properly charged up to the ditch if it is intended for a water pipe than if it is to hold a sewer.[19] There is then no reason in economic fairness why this particular element of cost should be singled out from others for exemption. To argue that since at present there is no liability this cannot be reckoned among the cost items is to assume the very point in issue, which is, ought it to be so reckoned? Nor is such compensation objectionable as taxation for a private purpose; it is analogous to a payment to the owner deprived of his land by eminent domain. It is often said, in decisions refusing recovery, that the particular activity in question was being carried on for the benefit of the public, in contrast to those cases where it is said to be for the benefit of the municipality — as where a charge is made for services. Rarely if ever, however, does a city reap any net profit from an enterprise. In any case the activity must be for the benefit of the whole community; otherwise, by the prevailing rule, a municipality is constitutionally prohibited from engaging therein.[20] To apply the benefit test logically would mean that a municipal corporation would never be liable.

A municipal corporation, like a private corporation, is a creature of the state and subject to the laws. Its exemption from liability does not rest as does that of the sovereign on the impossibility of being sued at common law, but on grounds of policy.[21] *Primâ facie*, then, a city should be under precisely the same duties and liabilities as to the ownership of property and employment of agents as is the private person similarly situated. This duty arises not through a statute authorizing or commanding a certain activity,[22] but because the very ownership of property or use of agents imposes a relationship or duty to the surrounding world. Two important considerations favor recovery. There is the justice of compensating the plaintiff for his injury.[23] And there is the care- and efficiency-inciting effect that recovery will exercise on the city as to the character and conduct of its employees and the condition of its property.[24] But as in the general law of torts the presence of certain countervailing interests constitutes a justification, defeating recovery, so where a municipal corporation is the defendant there may be in certain cases special considerations calling for exemption. Thus the exigencies of maintain-

[19] Of course, for things happening in the course of sewer work municipalities are liable, but on the test now under consideration they would not be.

[20] Loan Ass'n. *v.* Topeka, 20 Wall. (U. S.) 655; Lowell *v.* City of Boston, 111 Mass. 454; Allen *v.* Inhabitants of Jay, 60 Me. 124.

[21] This is recognized in Workman *v.* New York City, 179 U. S. 552, where recovery was allowed in admiralty for the negligent act of a municipal fire boat while attempting to reach a fire. It was admitted that the local law denied recovery, yet since the law might vary from state to state recovery was allowed for the sake of uniformity in maritime law.

[22] That this difference in the form of the statute, often spoken of as material to the question of tort liability, is really immaterial, see Tindley *v.* City of Salem, 137 Mass. 171, 175.

[23] This consideration is receiving increasing emphasis to-day. The tendency is to shift the burden, particularly of a bodily injury, to the community. Workmen's compensation acts, old age, sickness, and unemployment insurance, and the increasing strictness of the common carrier's liability are examples that come readily to mind.

[24] See 4 DILLON, § 1714.

ing law and order may well demand that a policeman in the exercise of his duty be unhampered by the apprehension of possible lawsuits against either himself or the city. So also there may be a strong public interest in sending the fire engine to the scene of the fire as soon as possible, unchecked by thought of liability for what happens *en route*.[25] But unless the presence of some public interest can be affirmatively shown to require a denial of recovery, the municipal corporation should not be granted exemption. It is difficult to find any useful purpose furthered by exempting for the trespass of the fire horse that casually wanders from his stable,[26] or for the condition of the town hall, or the acts of its janitor in removing snow from the roof.[27] To restate the law of municipal liability according to this view calls for a return to first principles through a careful, conscious analysis of the underlying interests in each case. On analogy to general tort principles such a process is entirely sound; and it is necessary if this branch of the law is to be shaped into a consistent, satisfactory system.[28]

JURISDICTION OF EQUITY TO GRANT A RECEIVER WHERE NO OTHER RELIEF IS SOUGHT. — A Pennsylvania County Court has granted a receiver for the property of an individual, upon the petition of unsecured creditors who sought no other relief to which a receivership would properly be ancillary. *Thompson's Receivership*, 44 Pa. County Court, 518.[1] The decision is a novel one. It is a generally accepted rule that equity has no jurisdiction without statute[2] to appoint a receiver for a fully capable legal person,[3] in a case where such appointment is the sole object of

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[25] Wilcox *v.* City of Chicago, 107 Ill. 334.

[26] See 19 HARV. L. REV. 386.

[27] Kelley *v.* City of Boston, 186 Mass. 165, 71 N. E. 299.

[28] On the principles here advocated there would be liability in most, if not all cases arising from property ownership. See JONES, NEGLIGENCE OF MUNICIPAL CORPORATIONS, 36. Miles *v.* City of Worcester, 154 Mass. 511, 28 N. E. 676; Briegel *v.* City of Philadelphia, 135 Pa. St. 451, 19 Atl. 1038. (But *cf.* Ham *v.* Mayor, etc. of New York, 70 N. Y. 459.) Recovery should be granted where the dangerous condition of a fire engine injures a workman engaged in repairing the same. City of Lafayette *v.* Allen, 81 Ind. 166. So also for negligence in building a cistern for the use of the fire department. Mulcairns *v.* City of Janesville, 67 Wis. 24, 29 N. W. 565. And streets and sewers would cease to be the anomalous exceptions to the rules regulating liability that they are at present.

[1] For a fuller statement of the facts, see RECENT CASES, p. 289. An ancillary receiver was appointed in the Federal District Court in West Virginia, but on appeal the Circuit Court of Appeals held this appointment void. (Not yet reported.) Application has been made to the Supreme Court for a writ of *certiorari* to review this last decision.

[2] Where a statute provides for the appointment of a receiver for a corporation which is insolvent or in danger of insolvency, the courts in some cases have apparently considered that the statute meant that a receiver could be appointed where this was the sole object of the suit. Hall *v.* Nieukirk, 12 Idaho 33, 85 Pac. 485; *In re* Lewis, 52 Kan. 660, 35 Pac. 287; Mauch Chunk Bank *v.* U. S. Encaustic Tile Co., 105 Ind. 227, 4 N. E. 846. It is questionable even in these cases, however, whether the receivership is not really ancillary to some other suit.

[3] Courts of equity have from earliest times had power to protect the property of infants and lunatics. As to the nature and origin of this power, see 3 POMEROY, EQUITY JURISPRUDENCE, §§ 1304–07, 1311 *et seq.*; BISPHAM, EQUITY, §§ 541–43, 551–52. As a result of this "particular" jurisdiction the court will always appoint a receiver for an infant or a lunatic in a proper case, although the receiver is the sole object of the suit. *Ex parte* Whitfield, 2 Atk. 315; Jones *v.* Bank of Leadville, 10 Colo. 464, 17 Pac.